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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

*Petitioner,*

v.

FRANCES B. DAVIS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

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## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

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This brief is filed pursuant to leave granted in open Court by the Chief Justice during the course of the oral argument in this case on Monday, April 23, 1979. This brief is limited to a response to the amicus brief submitted by the Solicitor General on behalf of the United States. Leave to file that tardy amicus brief was given by the Court on April 23, the day of the oral argument.

## I.

## THE SOLICITOR GENERAL'S BRIEF IGNORES THE ESTABLISHED CONGRESSIONAL POLICY RESPECTING NURSE TRAINING PROGRAMS.

At the heart of this case is the public interest in having the safest possible nursing care for those who are ill or injured. That concern for the safety and welfare of the sick is necessarily implicated by the petitioner's Associate Degree Nursing Program, which calls upon the nurse trainees to deal directly with hospitalized patients in a wide spectrum of clinical situations. And it was that concern, the concern that respondent's hearing impairment constituted a "potential danger to future patients," in clinical situations, that motivated the District Court's approval of the College's denial of admission.

The Solicitor General's brief ignores this overriding public concern. It thereby ignores the impact of this concern upon the interpretation and application of Section 504 with respect to a federally funded program of this clinical nature. At the same time, the Solicitor General's brief ignores the concern that Congress has consistently shown with respect to maintaining a high level of nurse training programs in order to provide the public with the safest possible nursing care by fully qualified nurses.

As discussed more fully in petitioner's reply brief herein, pp. 12-16, Congress has carefully erected a statutory policy with respect to federally funded nursing school programs, a policy that antedates Section 504 and that must be respected when dealing with Section 504.

Congress exhibited a concern that qualified persons be trained to meet the public needs for safe nursing care when it enacted the Nurse Training Act of 1964, 78 Stat. 912.



Whatever federal funding the petitioner's nursing program has received comes directly from that 1964 statute, which was designed to meet the public need for safe nursing by funding programs to train fully qualified nurses. Congress expressly promised that such grants would in no way be conditioned on changing the curriculum, personnel, methods of instruction or administration of any nurse training program. 42 U.S.C. § 298a. In other words, Congress recognized that federally funded nurse training programs – the very kind of programs that appear to fall within the scope of Section 504 – must maintain a high level of training of those who are physically qualified to provide safe nursing care. There is to be no compromise in programming to permit the training of the unqualified or the half-qualified.

At the same time, Congress has also recognized that the seriously handicapped should be allowed the opportunity to be trained for physically-demanding vocations and professions to the best of their physical abilities. To that end, the Education Amendments of 1974, 20 U.S.C. § 1424a, authorized a system of grants to develop such special programming for the handicapped. That is precisely the kind of programming that respondent seeks to have established under Section 504.

Section 504, when fitted into this overall statutory scheme, is obviously not a vehicle for accommodating and modifying nurse training programs to suit the needs of the physically handicapped. At least with respect to federally-funded nurse training programs, Section 504 was not meant to repeal or modify the Nurse Training Act commitment to maintain the most demanding levels of training necessary to provide safe nursing care. Nor was Section 504 deemed a substitute means of providing special nurse training programs for the

seriously handicapped. Such programs are available under the Education Amendments of 1974.

All of this confirms the propriety of reading Section 504 to mean precisely what it says. Its nondiscrimination duty reaches only the "qualified," handicapped individual. By no stretch of its language can Section 504 be viewed as an affirmative accommodation dictate with respect to handicapped persons who are physically unqualified to participate safely in a nurse training program.

## II.

## THE DEFINITION OF "OTHERWISE QUALIFIED" URGED BY THE SOLICITOR GENERAL AND HIS CONTENTION THAT A GENERAL AFFIRMATIVE ACTION OBLIGATION EXISTS FOR FEDERAL GRANT RECIPIENTS MUST BE REJECTED AS UNFOUNDED IN LIGHT OF THE LANGUAGE AND HISTORY OF SECTION 504.

Apparently rejecting the Fourth Circuit's clearly erroneous view of the meaning of Section 504, the Solicitor General has nevertheless retreated to a position with no sounder foundation. Rather than point to any language in Section 504 (or anything in its original history) justifying his interpretation of the words "otherwise qualified" the Solicitor General seems content to patch together disparate, after the fact and often out of context utterances from committee reports and debates. The end result is a broken-mirror image of the statute which distorts rather than reflects legislative intent.

The Solicitor General says that Section 504 does not require an educational institution receiving federal funds to gauge a handicapped applicant's qualifications either "without resort to" or "in spite of" his or her handicap. Rather,



he argues that Section 504 requires a recipient first to determine whether an applicant meets "admission standards unrelated to physical ability and then, if the decision is affirmative, to consider whether the program of instruction" can be modified "to permit the applicant to participate." U.S. Br. 29-30, 34, 38-39. This position rises or falls, however, on the presumed existence in Section 504 of a requirement for federal grant recipients to take affirmative action with respect to the handicapped. The bits-and-pieces approach adopted by the Solicitor General to determine legislative intent, of course, is not applicable where, as here, the statute's meaning is plain. But even were it to apply, it fails to justify his proposition.

For example, the Solicitor General repeatedly refers to language in Senate Report No. 93-1297 (93d Cong. 2d Sess. (1974)) on the Rehabilitation Act Amendments of 1974, *reprinted in* [1974] U.S. Code Cong. & Admin. News 6373, which he claims states that "Section 504 'is intended to include a requirement of affirmative action as well as a prohibition against discrimination.'" *Id.* at 33. The full quote from that report, not reproduced by the Solicitor General, is (emphasis added):

> *Where applicable,* section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination.

In the next few pages of the report it becomes clear that the phrase, "Where applicable," is a reference to State vocational rehabilitation plans submitted in connection with Title I of the Rehabilitation Act, *not to federal grant programs in general.* In fact, the 1974 amendments to the Act imposed a requirement on State agencies and every other facility in receipt of assistance under Title I of the Act to take affirmative action *to employ* certain qualified

individuals. 29 U.S.C. § 721(a)(6). In terms similar to the paragraph containing the Solicitor General's truncated quote, the Senate Committee said that:

> "[*T*]*hese* State agencies and facilities should be held to the same exemplary standard for affirmative action required of the Federal agencies with particular responsibilities for programs affecting handicapped individuals, in order to serve as a model for compliance with the affirmative action that is required of all Federal contractors and all Federal sub-contractors under section 503 of the Act." *Id.* at 6392 (emphasis added).

It is instructive to note that if Section 504 when enacted in 1973 was intended to impose an affirmative action requirement on federal fund beneficiaries there would have been no need for Congress in 1974 to require affirmative action by Title I beneficiaries.[1]

In addition, *nowhere* in the 1978 amendments to the Act or legislative committee reports is there any statement that all federal beneficiaries simply by the terms of Section 504 are required to modify programs in the name of affirmative action. Nor does the fact that Congress authorized spending and grants for awarding services such as interpreters for the deaf, *see, e.g.*, 29 U.S.C. § 775, imply anything of this sort. Congress could have intended the offers of such services to assist grant recipients in complying with their affirm-

[1] In a similar vein, Congress in 1973 reasonably could not have intended to impose an affirmative action requirement on federal fund beneficiaries via Section 504 and at the same time in Section 501 to direct HEW to "encourage" State agencies (without qualification) to develop affirmative action programs for hiring the handicapped. *See* 29 U.S.C. § 791(c).



ative action duty pursuant to Title I of the Rehabilitation Act, or to aid the volunteer efforts of fund beneficiaries. More likely, Congress was attempting to treat the symptoms of HEW affirmative action excess rather than face the politically difficult cure.

Finally, nowhere in the Solicitor General's brief is there any explanation offered for Congress' imposition of an express affirmative action obligation under Sections 501 and 503 and failure to do so under Section 504. Petitioner submits that this omission was hardly inadvertent and that Congress deliberately chose not to impose such duties on all federal fund beneficiaries under Section 504. Because Section 504 imposes no affirmative action duty, the Solicitor General's circular definition of "otherwise qualified" is untenable and must be rejected.

## III.

## SECTION 1983 DOES NOT PROVIDE A VEHICLE FOR THE VINDICATION OF ALLEGED VIOLATIONS OF SECTION 504

The Solicitor General, on behalf of the United States as amicus curiae, has summarily asserted that because petitioner is a public educational institution, there is a direct route, via 42 U.S.C. § 1983 (1970), to federal district court for redress of respondent's statutory as well as constitutional rights. U.S. Br. 68-69. Thus the Solicitor General states that it is unnecessary to decide whether Section 504 of the Rehabilitation Act of 1973 gives rise to a private right of action as the instant case may be brought under Section 1983 to enforce the provisions of Section 504. However, such a conclusionary statement, without further discussion, presents an ostrich-like posture and ignores a major contro-

versy of federal jurisdiction left unanswered by this Court: namely, whether "§ 1983 authorizes suits to vindicate rights under the 'laws' of the United States as well as under the Constitution . . ." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1975).[2] The only case cited by the Solicitor General as authority, *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), does not support the proposition; it only eradicated the "personal-property rights" distinction in *constitutional* challenges to state welfare practices under Section 1343(3). 405 U.S. at 542. Yet, this question has been the focal point of scholarly discussion[3] and central to recent cases argued before this Court. *See Chapman v. Houston Welfare Rights Organization*, No. 77-719 (argued October 2, 1978); *Gonzalez v. Young*, No. 77-5324 (argued October 2, 1978).

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[2] As noted in petitioner's reply brief filed with this Court on April 20, 1979, it is unnecessary to address this jurisdictional question as respondent's Section 1983 claim has at all times been solely grounded on an alleged violation of the Fourteenth Amendment and not Section 504 of the Rehabilitation Act of 1973. Nor does this case fall within the "substantiality doctrine" of *Hagans v. Lavine* that Section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), allow a district court to adjudicate as a matter of pendent jurisdiction a statutory claim under the Civil Rights statutes when they are accompanied by a constitutional claim of sufficient substance. In such cases, it is unnecessary for the court to determine whether such a statutory claim in its own right is sufficient to support federal jurisdiction. *See* Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

[3] *See* Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 16-18 (1970); Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404 (1972).



Petitioner contends, for the reasons discussed below, that 42 U.S.C. § 1983[4] cannot be utilized as a bootstrap to imply a private right of action under Section 504 against a "person"[5] acting under color of any State law for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws, . . . ."

To begin with, Section 1983 does not come into play without a "right" which is secured by the Constituion and laws. On this point, petitioner has maintained throughout this action that the plain meaning of Section 504 as well as its legislative history negates any attempt to imply a private right of action under its provisions. There has already been ample discussion in the briefs submitted by both petioner and the thirty-two States as amici curiae that application of the *Cort v. Ash* (422 U.S. 66 (1975)) standards and the 1978 amendments to the Rehabilitation Act lead to the inevitable conclusion that no private right of action may be implied under Section 504. *See also, Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *petition for certiorari pending*, No. 78-1454. It would be

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[4] In its entirety, the statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] Of course, as an agency of the State of North Carolina, petitioner Southeastern Community College is not a "person" under Section 1983. *See* Quern v. Jordan, No. 77-841, decided March 5, 1979. This fact provides another reason for dismissing the Solicitor General's Section 1983 argument in this case.

anomalous on one hand to conclude that no private right of action exists under Section 504 but on the other hand to allow such private actions when the recipient of federal funds acts under color of State law. There is absolutely no indication that Congress ever intended to distinguish between private and public recipients of federal financial assistance. Such an interpretation would make it unnecessary for Congress ever to provide explicitly for a private right of action in that one could always be implied against a public institution under any of the infinite number of federal laws. Thus, Section 1983 would render the *Cort v. Ash* test totally superfluous.

In any event, the rights under Section 504 are those that empower the federal government under its implementing regulations to step in and secure compliance with its nondiscrimination policy for recipients who have received federal grant funds. It has long been recognized by this Court that the United States has an implied authority to sue for vindication of its proprietary and contractual interests in grants that it has made. *United States v. San Francisco,* 310 U.S. 16, 29-30, (1940); *United States v. Bell Telephone Co.,* 128 U.S. 315, 356-73 (1888); *United States v. San Jacinto Tin Co.,* 125 U.S. 273, 279-85 (1888). Additionally, a recipient can bring an action in court to question ultra vires actions of HEW in enforcing the statute. *Mayor and City Council of Baltimore v. Mathews,* 562 F.2d 914 (4th Cir. 1977), *withdrawn on other grounds,* 571 F.2d 1273 (4th Cir. 1978).

Even if Section 504 conferred rights on otherwise qualified handicapped individuals who allege discrimination on the part of recipients of federal funds, it does not fall within the definition of an act of Congress providing for equal or civil rights which is a necessary prerequisite for jurisdiction under Section 1983. Because Section 1983 speaks to



rights, privileges, or immunities "secured by the Constitution and laws," it could be argued that it provides a cause of action to hear a case brought pursuant to *any* law which bestows an express or implied right. This line of reasoning is tenuous at best, however, as in and of itself Section 1983 is a substantive statute providing a cause of action but not conferring jurisdiction. Rather, entrance into a federal district court is gained through its jurisdictional counterpart, 28 U.S.C. § 1343(3),[6] which confers district court jurisdiction over any civil action "authorized by law . . . to redress the deprivation, under color of State law . . . of any right . . . secured by the Constitution . . . or by any *Act of Congress providing for equal rights* . . ." It is readily apparent that Section 1343(3) is narrower that the language of Section 1983 in that the latter speaks to rights ". . . secured by the Constitution and laws . . ." without the limitation that such laws provide for "equal rights." Based in part on this limiting language of Section 1343(3) it has been held that this subpart does not provide jurisdiction over claims that a State has violated the Social Security Act which is not an equal or civil rights statute. *See Gonzales v. Young,* 560 F.2d 160 (3d Cir. 1977); *Andrews v. Maher,* 525 F.2d 113 (2d Cir. 1975); *Aguayo v. Richardson,* 473 F.2d 1090, 1101 (2d Cir. 1973), *cert. denied sub*

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6 This statute states in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

*nom. Aguayo v. Weinberger,* 414 U.S. 1146 (1974); *Almenares v. Wyman,* 453 F.2d 1075, 1082 n.9 (2d Cir. 1971), *cert. denied,* 405 U.S. 944 (1972); *McCall v. Shapiro,* 416 F.2d 246 (2d Cir. 1969); *Rosado v. Wyman,* 414 F.2d 170, 177, 181 (2d Cir. 1969), *rev'd on other grounds,* 397 U.S. 397 (1970). *Accord, Randall v. Goldmark,* 495 F.2d 356, 359 (1st Cir. 1974), *cert. denied,* 419 U.S. 879 (1974); *contra, Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974).

Thus, the issue is basically the extent to which the language in Section 1343(3) limits the general and broad words of Section 1983. There is little in the way of judicial opinions to shed light on this problem. *See Holt v. Indiana Manufacturing Co.,* 176 U.S. 68 (1900), which states that the provisions of Sections 1983 and 1343(3) "refer to civil rights only and are inapplicable here." *Contra, Bomar v. Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947).

Both Sections 1983 and 1343(3) share a common origin in Section 1 of the Civil Rights Act of 1871[7] and these provisions were meant to be complementary and construed together. *Examining Board v. Flores de Otero,* 426 U.S. 572, 583 (1976); *Lynch v. Household Finance Corp.,* 405 U.S. at 543 n.7. Their meaning may be found by examining the language of their provisions, the purposes of Congress in their enactment, and the circumstances surrounding the use of their words. *Examining Board v. Flores de Otero,* 426 U.S. at 580.[8] It is the position of petitioner

[7] Ch. 22, § 1, 17 Stat. 13 (1871).

[8] The first section of the 1871 Act provided:

> [a]ny person who, under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person with the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall . . . be liable to the party injured in an action at law, suit in equity, or other proper proceeding to be prosecuted in the several district or circuit courts . . . under the provisions of the act of the ninth of April 1866 . . . .



that application of these factors leads to the conclusion that any rights secured under Sections 1983 and 1343(3) must be based directly on Section 1 of the Fourteenth Amendment or on that section *and* on legislation specifically implementing its guarantee of equal rights. *See* respondent's brief in *Gonzalez v. Young,* at 34. This position gains support from the Court's comments in *Monell v. Dept. of Soc. Serv. of the City of New York,* 436 U.S. 658, 681 (1978), that ". . . § 1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment." Further, in an earlier opinion, this Court observed, "It has been said that the purpose of the legislation [§1 of the Civil Rights Act of 1871] was to enforce the provisions of the Fourteenth . . . Amendment." *Flores de Otero,* 426 U.S. at 582. Also, at the time of its enactment, the 1871 Act was referred to as a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." *Monell,* 436 U.S. at 665; *Monroe v. Pape,* 365 U.S. 167, 171 (1961).

Thus, it is important that the source of Section 1 of the Fourteenth Amendment is the Civil Rights Act of 1866, of which Section 2 was the model for Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. *See Lynch v. Household Finance Corp.,* 405 U.S. 540, 543 at n.7.[9]

[9] In part, the enactment of the Fourteenth Amendment was prompted by a need to ensure the permanency of rights secured by the 1866 Act and to resolve lingering doubts as to its constitutional

In its original version, Section 1 of the 1871 Act contained both the substantive provision protecting against the deprivation of any rights "secured by the Constitution" as well as the jurisdictional provisions authorizing proceedings in both the district and circuit courts of the United States. However, in 1874 when Congress revised and codified the various civil rights acts, important changes were made affecting Section 1 of the 1871 Act. The recodification resulted in the statutes being divided into separate substantive and jurisdictional sections and what is today Section 1983 was then designated as Rev. Stat. § 1979 (1875). It was in this new provision that for the first time the phrase ". . . secured by the Constitution *and laws,*" was used (emphasis added).[10] Furthermore, although the jurisdictional grant to the district courts was basically identical to the substantive provision in Section 1979,[11] the jurisdictional grant to circuit courts limited its provisions to rights secured by the constitution or by any act of Congress *"providing for equal rights."* Rev. Stat. § 629(16) (1875). *Lynch v. Household Finance Corp.*, 405 U.S. at 543 n.7. These changes occurred without comment or any indication that they were intentional. Just as silently, in 1911 when the circuit courts' original jurisdiction was abolished by Congress, the "equal rights" language of the circuit court provision was retained with the enactment of what is today Section 1343(3) providing solely for district court jurisdiction. Act of Mar. 3, 1911, 36 Stat. 1087.

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authority. Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev 1323, 1329-1333 (1952).

[10] It has been suggested that this language was added to assure a remedy for the deprivation of those rights that came under the Civil Rights Acts of 1866 and 1870. Note, Federal Jurisdiction Over Challenges to State Welfare Systems, 72 Colum. L. Rev. at 1418.

[11] Rev. Stat. § 563(12) (1875).



Petitioner submits that this historic entanglement and almost symbiotic relationship of Sections 1983 and 1343(3) compel the reading of "rights . . . secured by the Constitution and laws" to mean rights that have their basis in the guarantees of Section 1 of the Fourteenth Amendment and in laws in conjunction with the Amendment that implement its guarantees. Only this interpretation supplies some rationale for the original choice and subsequent retention by Congress of the "equal rights" language of Section 1343(3). In addition, this construction avoids the dramatic expansion of federal jurisdiction that would be the consequence of allowing private rights of action to be brought against public officials and institutions under "any" of the infinite laws that presently make up the United States Code. As petitioner indicates in the discussion below, nothing in the words or history of Section 504 brings it within the confines of a law providing for equal rights within the meaning of Sections 1983 and 1343(3).

Nor is Section 504 an act "providing for the protection of civil rights," which would support jurisdiction under 28 U.S.C. § 1343(4). This provision grants original jurisdiction to the district courts over actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." One liberal but faulty theory of jurisdiction under Section 1343(4) is that Section 1983 is an "Act of Congress providing for the protection of civil rights," and therefore any cause of action that can be asserted under Section 1983 would immediately qualify for jurisdiction under Section 1343(4). *See Gonzalez v. Young*, 560 F.2d 160, 167-68 (3d Cir. 1977); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). This "chicken and egg approach," as aptly described in *Gonzalez*, fails for several reasons. First, the language of the

two provisions are not the same in that Section 1343(4) is more restrictive than Section 1983. Second, Section 1983 "merely provides a procedure by which substantive rights secured by other statutes can be asserted," and does not in and of itself create or secure substantive rights. Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1427 (1972); *Gonzales v. Young*, 560 F.2d at 168. Consequently, as Section 504 is not an act "providing for the protection of civil rights"[12] there is no substantive right that provides a cause of action by which jurisdiction can be assumed under Section 1343(4).

Another objection to this theory is that the legislative history of Section 1343(4) indicates that this subsection was enacted to ensure jurisdiction for claims that were based upon the Civil Rights Act of 1957. *See*, H.R. Rep. No. 85-291, 85th Cong., 1st Sess., *reprinted in* [1957] U.S. Code Cong. & Admin. News 1966, 1976. Obviously, Section 504 is not based on that act. Despite this significant restriction placed on the subpart by the legislative history, this Court has allowed jurisdiction under Section 1343(4) in cases involving acts other than the Civil Rights Act of 1957. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1, (1968) (Civil Rights Act of 1866); *Allen v. Board of Education*, 393 U.S. 544, 554 (1969) (Voting Rights Act of 1965). However, as the Second Circuit observed in *Andrews v. Maher*, "there is a difference between extending Section 1343(4) to laws such as these, which protect specific rights and engender comparatively little litigation, and applying it to Section 1983, which protects all rights 'secured by the Constitution and laws,'" 525 F.2d at 120. Further, the court in *Randall v. Goldmark*, 495 F.2d 356, 360 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974), voiced this warning:

[12] See discussion *infra* at 17.



> "Although [Jones v. Mayer] might be taken as an endorsement of a broad reading of the statute, applying § 1343(4) to § 1983 would in essence eliminate the jurisdictional requirement for any federal question case involving deprivations under color of State law, a consequence arguably so broad when measured in the light of the congressional objectives in adding § 1343(4) that we prefer not to make a positive commitment at this time."

Of course, Section 504 is neither a statute providing for equal rights within the meaning of Section 1343(3) nor is it a civil rights statute within the meaning of Section 1343(4). As the Solicitor General has conceded, the statute "focuses primarily on the provision of federal financial assistance for vocational rehabilitation programs." U.S. Br. 25-26. It was patterned after and is almost identical to the antidiscrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683. S. Rep. No. 93-1297, 93 Cong., 2d Sess. 39-40, *reprinted in* [1974] U.S. Code Cong. & Admin. News 6390. All three of these nondiscrimination statutes were enacted by Congress in the exercise of its spending power under Art. 1, § 8, clause 1 of the Constitution. This, too, has been noted by the Solicitor General (U.S. Br. in *Cannon v. University of Chicago*, No. 77-926, at 29): "the legislative authority invoked by Title VI is the power to spend federal funds. Congress can legitimately impose specific conditions on those who voluntarily receive federal financial assistance." There is sparse legislative history on Section 504 but in discussing the origins of Title VI, Representative Celler stated:

> "The enactment of Title VI is intended to provide . . . express statutory support for action

> being taken by the executive branch. As a matter of simple justice, federal funds, to which taxpayers regardless of race, color, or creed contribute, ought not to be expended to support or foster discriminatory practices." 110 Cong. Rec. 2466, 2468 (1964).

Also, Representative Rodino stated, "I believe this Title VI is an exercise of the undoubted power of Congress to fix the terms upon which federal funds will be spent." 110 Cong. Rec. 2466, 2468 (1964). Furthermore, Senator Humphrey, in pointing out several reasons for Title VI stated: "The purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544.

The most illuminating statement as to its authority is contained in a legal memorandum dealing with the constitutionality and legality of Title VI inserted in the Congressional Record by Representative Celler, a sponsor of the legislation:[13]

> "Title VI is not an exercise of regulatory authority over activities within the States. Its application is confined to programs and activities which receive Federal financial assistance, by way of grant, loan, or contract and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available." 110 Cong. Rec. 1527.

In conclusion, the Solicitor General, by asserting Section 1983 affords a private right of action under Section 504

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[13] See the brief submitted by Yale University as amicus curiae in Cannon v. University of Chicago, No. 77-926, for an excellent discussion of the spending power as the authority for Title VI.



in cases that involve public recipients, would take the lid off Pandora's Box. For the reasons that have been discussed above, petitioner urges this Court to restrict jurisdiction under this statute to the appropriate equal and civil rights cases to which it was intended to apply. Section 504 clearly falls beyond this intended scope.[14]

## CONCLUSION

The considerations advanced herein further justify reinstating the District Court's judgment.

Respectfully submitted,

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[14] As conceded by the Solicitor General:

> "Congress [in adopting Section 504] simply enacted a provision prohibiting discrimination against the handicapped in federally funded programs; it did not describe the kinds of practices it wished to ban or the way in which victims of illegal discrimination could obtain relief." (U.S. Br. at 31.)